

1 Longstreth

2 independent directors of Marvel.

3 Q. Is it your understanding that the
4 arm's length negotiations that would occur
5 here would have to be tantamount to
6 negotiations that would occur between two
7 completely independent companies, companies
8 that had no cross ownership so they each had
9 their own advisors, they had their own
10 interest, and they were looking out for
11 themselves on each side of the table?

12 A. Can you repeat the question?

13 Q. Sure.

14 I'll try to phrase it in a better
15 way.

16 Is it your understanding that the
17 arm's length bargaining, this hypothetical
18 arm's length bargaining, should be bargaining
19 in which each side is acting as if they were
20 completely independent, separate companies
21 bargaining with solely their own interests at
22 stake?

23 A. That's a compound question and
24 there is part of it that makes it hard to
25 answer.

1 Longstreth

2 Q. Okay. Why don't you explain what
3 the difficulty is?

4 A. Well, when you say as if they were
5 completely independent, that isn't the fact.
6 The fact is that 80 percent of Marvel is
7 owned by --

8 Q. I understand.

9 What I'm trying to say is the goal
10 in setting up a structure.

11 A. It's an arm's length bargaining, so
12 arm's length implies that you are free to
13 negotiate in your own interest without
14 conflict. So -- I mean, the people that I'm
15 talking about doing the negotiating would be
16 representing the Marvel and its shareholders,
17 all of its shareholders.

18 Q. And is it your understanding in the
19 hypothetical bargaining that you are
20 considering for purposes of your second
21 report that Mr. Perelman would be in this
22 transaction free to negotiate on his behalf
23 across the table from this independent
24 committee or whatever the structure was set
25 up to create independence?

1 Longstreth

2 A. I think if the independent
3 directors were truly independent and they
4 were acting as I described just a minute ago
5 for the benefit of Marvel and all of its
6 shareholders, Mr. Perelman could negotiate on
7 his side. That's right.

8 Q. And would you expect --

9 A. I mean, he wouldn't be precluded
10 from participating on his side to reflect his
11 interests.

12 Q. Would you expect each side to
13 engage their own financial advisors to
14 analyze a transaction from each of their
15 perspectives?

16 A. Well, I don't know what to say
17 about him, but I did say that I would expect
18 the independent directors to seek financial
19 expertise and negotiating skill. The reason
20 you do that is not just because you need some
21 expertise. You may not need it, but the
22 presence of someone to negotiate for you has
23 tactical advantages.

24 Q. And the financial advisor that
25 Marvel would retain, as I take it from your

1 Longstreth

2 first report, would come up with as many
3 alternative ways to negotiate on behalf of
4 Marvel as reasonably possible; is that
5 correct?

6 A. I don't know what they would come
7 up with.

8 Q. Have you made any attempt to
9 construct for purposes of the hypothetical
10 bargaining you're talking about, the
11 positioning that Marvel's financial advisors
12 would take?

13 MR. FRIEDMAN: I object to the
14 form of the question.

15 Q. It's a bad question. Let me
16 rephrase it.

17 Have you attempted to construct the
18 points of negotiation that would have been
19 developed by Marvel's financial advisors
20 going into the negotiations?

21 A. I think my two reports taken
22 collectively indicate a whole host of
23 considerations that independent directors
24 acting independently would take into account.

25 Q. And would those -- does your report

1 Longstreth

2 identify the term, the financial terms that
3 the Marvel bankers would be armed with going
4 into the negotiations with Mr. Perelman?

5 A. The financial terms?

6 Q. Well, the financial analysis that
7 they would present to Mr. Perelman's side.

8 A. Well, my report is what it is. I
9 don't know whether it fits that definition or
10 not.

11 Q. Have you made any attempt in
12 putting together your analysis to look at the
13 negotiations from Mr. Perelman's perspective
14 and to understand what his best points to
15 present to Marvel would be in the
16 negotiations?

17 A. Well, I haven't tried to outdo
18 Mr. Fowler in his representation of
19 Mr. Perelman and -- so the answer is I took
20 what Mr. Fowler said to be the Perelman
21 position is as good as it gets.

22 Q. So you made no independent attempt
23 to analyze Mr. Perelman's position and what
24 his bargaining position would be?

25 A. Well, I didn't say that. What I

1 Longstreth

2 said was in the rebuttal we have, Mr. Fowler
3 advanced a hypothetical negotiation and I
4 took it that he was representing
5 Mr. Perelman's point of view as well as it
6 could be represented. I didn't try to do it
7 over again.

8 Q. And before Mr. Fowler put in his
9 report, had you given any consideration to
10 the positions that Mr. Perelman would take in
11 the negotiations?

12 A. Yes, and whatever consideration I
13 gave is reflected in my original report.

14 Q. If you take a look at your second
15 report, which is Exhibit 6, in the last
16 paragraph of the first page.

17 A. Uh-huh.

18 Q. That begins "In my opinion".
19 Do you see that?

20 A. Yes.

21 Q. The second sentence quotes from
22 Mr. Fowler's report?

23 A. That's right.

24 Q. And it says "Exchange 1
25 unrealistically starts with Marvel saying the

1 Longstreth
2 restrictions" -- and that's capitalized --
3 "hinder our ability to operate Marvel."

4 What is, for purposes of your
5 report, your understanding of the term
6 "restrictions" as used there?

7 A. As that term, I think, is defined
8 in Mr. Fowler's report, it refers to the
9 negative covenants that were put in the note
10 agreements. Or the notes.

11 Q. Let's take a look at Mr. Fowler's
12 report and where he defines the term
13 restrictions.

14 A. Can you show me where that is?

15 Q. It's in paragraph 3, which is on
16 page 1 to 2.

17 MR. FRIEDMAN: Is there a
18 question?

19 MR. LOCKWOOD: I thought there
20 was, maybe there wasn't.

21 Q. Have you read paragraph 3?

22 A. I have.

23 Q. Are those four covenant provisions
24 that he cites in paragraph 3, are those the
25 restrictions that you were focused on in your

1 Longstreth

2 rebuttal report?

3 A. Yes.

4 Q. Let me show you --

5 A. They are the ones that I quote -- I
6 quote from his report.

7 Q. Let me show you a document that --
8 it's been previously marked. I'm going to
9 mark it again. To keep the record clean,
10 we'll mark it as Fowler 8.

11 MR. FRIEDMAN: Longstreth 8 you
12 mean?

13 MR. LOCKWOOD: Longstreth 8.

14 Thank you.

15 (Longstreth Exhibit 8, Excerpt
16 from Marvel III Holdings Indenture,
17 marked for identification, as of this
18 date.)

19 Q. It is an excerpt from the Marvel,
20 Marvel Roman numeral III holdings indenture.

21 MR. FRIEDMAN: Do you want the
22 witness to look at any part of Exhibit
23 8?

24 MR. LOCKWOOD: Yes, I do, since
25 he has it in front of him, which he

1 Longstreth
2 does now.

3 Q. Mr. Longstreth, I'm not trying to
4 hide anything from you here. I just want to
5 show you paragraph 3 includes four covenant
6 provisions, two of which are part of Section
7 4.04 of the indentures, one that is part of
8 Section 4.05 of the indentures, and one that
9 is part of Section 4.09 of the indentures.

10 From reading your deposition in
11 April, I understood that your analysis in
12 your original report also addressed or
13 concerned Section 4.14 of the Marvel III
14 indenture, which is on page 57, if you use
15 the numbers on the bottom of the page of this
16 document.

17 A. 4.14?

18 Q. Yes.

19 A. That's the consolidation.

20 Q. "Tax deconsolidation event terms."
21 Do you see that?

22 A. Yes.

23 Q. In your rebuttal report, does your
24 analysis of the restrictions and the
25 negotiations relating to the restrictions,

1 Longstreth

2 does it include or exclude this Section 4.14
3 provision?

4 MR. FRIEDMAN: I object to the
5 form of the question.

6 A. Well, Mr. Fowler defined the
7 restrictions to simply include these
8 covenants, these negative covenants. My --
9 the thrust of my rebuttal report is that
10 that's too narrow a basis to be -- it's too
11 narrow a basis on which to arrive at a
12 conclusion about the nature of the arm's
13 length bargaining. And I have tried to say
14 that if they got down to negotiating, it
15 would be over all of the aspects of the note
16 issuances that involved Marvel in a
17 participatory way; in other words, in a
18 facilitating way.

19 Q. Would that include then Section
20 4.14, this tax deconsolidation event of the
21 Marvel III indenture?

22 A. Yes, it would.

23 Q. Have you read Mr. Fowler's
24 deposition?

25 A. No, I haven't.

1 **Longstreth**

2 Q. Have you had it summarized?

3 A. **Not that I can recall.**

4 Q. If you look at Exhibit 1, which is
5 your original report.

6 A. **Okay.**

7 Q. And the section that I'm interested
8 in is Exhibit B, the materials considered.

9 I understood from your testimony --

10 A. **Exhibit B? Okay.**

11 Q. Earlier today, you didn't go back
12 and rereview these documents in preparing
13 your second report; is that correct?

14 A. **That's correct.**

15 Q. But do these documents still inform
16 your judgment with respect to your second
17 report?

18 A. **I can't tell you.**

19 Q. Well, your understanding of the
20 overall facts in the case, where did that
21 come from?

22 A. **It came from Exhibit B and**
23 **discussions with counsel.**

24 Q. Is there information that you
25 relied on in your report that came from

1 Longstreth

2 discussions with counsel?

3 **A. No.**

4 Q. Well, one of the things that you
5 reference in each of your reports is you make
6 reference to certain of the minutes of Marvel
7 board meetings; is that correct?

8 **A. Yes.**

9 Q. And did you look at all of the
10 minutes or just those minutes that are listed
11 on Exhibit B?

12 **A. I didn't look at all the minutes.**

13 Q. Did you look at -- I take it
14 because it is listed here that you looked at
15 the minutes for the March 18, '93, March 9,
16 '94, December 12, '96 and December 26, '96
17 board meetings; is that correct?

18 **A. I did.**

19 Q. Do you know whether you looked at
20 any other minutes beyond those particular
21 minutes?

22 **A. I believe these were -- to the best**
23 **I can recall, these were the only minutes I**
24 **looked at.**

25 Q. Who selected those minutes for your

1 Longstreth

2 review?

3 **A. My counsel.**

4 Q. There is also listed here just
5 above, above that there are three opinion
6 letters?

7 **A. Yes.**

8 Q. One from each of the three
9 offerings.

10 Do you see that?

11 **A. Yes, I do.**

12 Q. And are those opinion letters, they
13 are documents that you would expect would be
14 found in the closing binders for each of
15 those three transactions, is that true, based
16 on your experience as a lawyer?

17 **A. Whatever opinions would be given**
18 **would be in the closing.**

19 Q. And I take it from the list of
20 materials considered here, you never saw the
21 closing binders; is that right?

22 **A. That's correct.**

23 Q. So it was counsel that selected the
24 three documents from the closing binders for
25 you to review; is that correct?

1 Longstreth

2 A. No, it isn't correct. I requested
3 the opinions. I said I -- if there were
4 opinions, I would like to see them. I was
5 interested in knowing who gave opinions.

6 Q. Is there anything else that you
7 recall requesting from counsel relating to
8 the closing documents for the note offerings?

9 A. The purchase agreements, the
10 underlying -- are they listed here? Well,
11 the offering memo I asked for.

12 You see the offerings memo there?

13 Q. Yes, I see an offering memo and an
14 indenture.

15 A. And the indenture. I think I was
16 provided with the indenture.

17 You're trying to distinguish
18 between things I was given and things I asked
19 for?

20 Q. At this point, I'm asking what
21 specific documents did you ask for that you
22 weren't given by counsel but you sought and,
23 therefore, obtained.

24 A. I think it is limited to the
25 opinions and the -- and maybe not all of the

1 Longstreth

2 opinions, I don't remember.

3 Q. In your second report, I can show
4 you exactly where if you would like me to,
5 you make reference to a comfort letter being
6 received from the auditors of Marvel.

7 Do you recall that's in your
8 report?

9 A. I know, yes.

10 Q. And I don't see that listed here on
11 your materials considered. Can you explain
12 that for me?

13 A. No, I can't explain it.

14 I believe that there was a comfort
15 letter.

16 Q. Was that something that the
17 attorneys brought to your attention or
18 something you asked about?

19 A. Something I asked about.

20 Q. I also note that other expert
21 reports that you told me you read are not
22 listed on the materials considered. Is there
23 a reason for that?

24 MR. FRIEDMAN: The other expert
25 reports, if I'm correct, were prepared

1 Longstreth

2 after Exhibit B was prepared.

3 MR. LOCKWOOD: That's true.

4 A. I never saw them before I wrote my
5 initial report.

6 Q. Your second report incorporates
7 Exhibit B by reference; is that right?

8 A. Sounds like an omission.

9 Q. Yeah, so those should have been
10 listed on a supplemental Exhibit B; is that
11 fair?

12 A. If I was -- let me see what this
13 says.

14 Yeah, I think it should have been.
15 I did add the Peter Fowler, but I didn't say
16 I looked at the other things.

17 Now, I mean, you know I think I
18 could explain this perhaps. First of all, I
19 can explain it as an oversight, but second, I
20 can explain it by the fact that those other
21 expert opinions were not central to what I
22 was doing, although I had seen them.

23 Q. Is there anything else that you
24 know that you saw that you don't see in
25 Exhibit B that you may have seen since

1 Longstreth

2 Exhibit B was prepared?

3 A. No.

4 Q. Let's go back to Exhibit 8, page
5 57, Section 4.14.

6 A. Exhibit 8, okay.

7 Q. Is it your understanding that this
8 is a put provision?

9 A. Oh, 4 --

10 Q. 4.14.

11 A. Yes, something like a put
12 provision, yes.

13 Q. And in general terms, how does a
14 put provision work?

15 A. Well, a put provision relates to
16 the financial instrument held by someone who
17 has the right to put that provision -- put
18 that financial instrument to somebody else.
19 In other words, deliver it. And demand
20 payment for it. So the typical case would be
21 a promissory note. The holder of the note by
22 contract has a right upon the occurrence of
23 specific events to take the note and deliver
24 it to somebody, in the classic case it would
25 be the issuer of the note, and demand payment

1 Longstreth

2 immediately. That's what a put means in sort
3 of general language.

4 Q. Let's talk specifically about 4.14,
5 this provision.

6 A. Okay.

7 Q. In this provision, there is a
8 defined term a "tax deconsolidation event".

9 Do you see that?

10 A. Yes.

11 Q. And we can get into the specifics
12 later, but the essence of this provision is
13 that if that defined term event occurs, then
14 the holders of the Marvel III notes have a
15 right to put their shares to Marvel III?

16 A. Put their notes?

17 Q. Put their notes. Is that correct?

18 A. To Marvel III for payment, right.

19 Q. And the payment that they are to
20 receive under the terms of 4.14 is 101
21 percent of the principal amount, correct?

22 A. Right.

23 Q. And do they get future interest to
24 put those notes, or do they get only interest
25 to date under the terms of 4.14?

1 Longstreth

2 A. I have to read it.

3 Did you say do they get future
4 interest?

5 Q. Yes. Do they get to accelerate
6 their interest for the remaining period of
7 the note or do they get only interest accrued
8 to the date of the put?

9 MR. FRIEDMAN: I have -- while
10 the witness is looking at that, I have
11 an objection and question, which is
12 whether your position is that this
13 line of questioning relates to Mr.
14 Longstreth's rebuttal report.

15 MR. LOCKWOOD: Yes, I do believe
16 it relates directly to Mr. Fowler's
17 report, so these are foundational
18 questions that I'm asking to get
19 there.

20 A. Well, the repurchase price is 101
21 percent of the principal amount plus accrued
22 and unpaid interest to the date of
23 repurchase.

24 I might have to read the whole
25 thing, but that paragraph says that you get,

1 Longstreth

2 and that's quite typical, you get a premium
3 on the principal amount at one percent and
4 you get paid your interest up to the date of
5 repurchase. That is what it seems to say.

6 But there is a subject to the right
7 of holders on the relevant record date to
8 receive interest due on the relevant interest
9 payment date. So, I would have to figure out
10 what that means.

11 Q. Did you in the hypothetical
12 bargaining that you were analyzing for
13 purposes of your rebuttal report?

14 A. Yes.

15 Q. Did you make any distinctions
16 between a put right, such as in Section 4.14,
17 and a restricted covenant that operates more
18 like the debt restriction in Section 4.04,
19 which reads "The company shall not permit
20 Marvel or any subsidiary of Marvel"?

21 A. Yeah, there is a distinction, one
22 is a negative covenant that if it is violated
23 triggers an event of default. This is an
24 event, which is worded in such a way that it
25 is not a thou shalt not, as much as a thou

1 Longstreth

2 shall if you do this or if this happens. If
3 the event tax deconsolidation event happens,
4 then we, the holders, are entitled to a put.

5 Now, the practical effect of the
6 two is the same because if -- I mean, if the
7 noteholders choose to put the notes, the
8 holding companies don't have the wherewithal
9 to pay it except -- because they don't have
10 any assets except the stock in Marvel. So it
11 would rapidly, unless somebody came to the
12 rescue, it would rapidly -- the put would
13 rapidly lead to an event of default.

14 Q. Why don't you take a look at
15 Mr. Fowler's report, which is Exhibit 6. And
16 I want to draw your attention to paragraph
17 32.

18 A. 32?

19 Q. Yes.

20 MR. FRIEDMAN: Fowler report, I
21 think is Exhibit 7.

22 MR. LOCKWOOD: You're right.

23 MR. FRIEDMAN: Paragraph 32.

24 Q. I'll give you a moment just to read
25 paragraph 32 instead of reading it aloud.

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2 Just let me know when you're done.

3 In fact, while I'm having you do
4 some reading, why don't you start by reading
5 the last two sentences of the previous
6 paragraph as well.

7 **A. Right. You mean 31?**

8 **Q. Yes.**

9 **A. The last how many?**

10 **Q. You can start --**

11 **A. A put option.**

12 **Q. Both, however the restrictions --**

13 **A. Yes.**

14 MR. FRIEDMAN: Let me interject
15 before you ask a question, that I
16 believe you have been asking questions
17 that go beyond the opinions expressed
18 by the witness in his rebuttal report,
19 and I believe questions you're asking
20 go beyond the opinions the witness
21 expressed in his initial report, and
22 to the extent that you open the door
23 and the witness expresses further
24 opinions, then we reserve and will
25 assert all of our rights with respect

1 Longstreth

2 to such opinions at trial.

3 And I want the record to be clear
4 that my view is you are going way
5 beyond the opinions previously
6 expressed.

7 MR. LOCKWOOD: I won't argue with
8 you here. I completely disagree, but
9 I won't argue with you here.

10 Q. The analysis that's in paragraph 31
11 and 32 that I just drew to your attention,
12 did you make any assessment of Mr. Fowler's
13 views that a protection similar to the
14 restrictions could be obtained by formatting
15 them as puts?

16 A. I didn't credit it with -- I didn't
17 give it much weight, let's put it that way.
18 I was looking at what actually happened, not
19 other things that -- other ways of
20 restructuring the transaction to possibly
21 accomplish the same kinds of processions that
22 the noteholders were seeking through what
23 they actually got. I didn't address -- I
24 didn't spend much time thinking about that.
25 I did think that the -- any analogy to a

1 Longstreth

2 margin loan was completely wrong.

3 Q. Well, in Mr. Fowler's construction
4 of the hypothetical negotiations between
5 Marvel --

6 MR. FRIEDMAN: What page are you
7 referring to, if I may ask?

8 MR. LOCKWOOD: I'm referring to
9 page 29, exchange 5.

10 A. Okay.

11 Q. His exchange is M -- and (a) from
12 Marvel says, "MacAndrews & Forbes must pay
13 Marvel for the restrictions in the notes",
14 and one of Mr. Fowler's responses is that
15 "MacAndrews & Forbes has other options, we
16 could issue LYONS or use puts instead of a
17 covenant package format."

18 Do you see that?

19 A. Yes.

20 Q. Did you, sir, do an analysis of
21 whether MacAndrews & Forbes had such other
22 options, such as using puts instead of
23 covenants?

24 A. I thought about it. It wasn't very
25 persuasive to me as a line of argument. I

1 Longstreth

2 think that if I were a director, or if I were
3 in charge of the argument, I would say well,
4 if that's the case, do what you can do
5 without tampering with our business, but if
6 you're going to tamper with our business, if
7 that's the way you want to do this, then
8 we're going to sit down and talk about what
9 it is going to cost you.

10 Q. Well, can you explain to me, you
11 said you didn't. You said you thought about
12 it and "it wasn't very persuasive to me".

13 Can you describe for me the
14 analysis you performed in making a judgment
15 as to whether Mr. Fowler had correctly
16 analyzed the put option, the option of using
17 puts?

18 MR. FRIEDMAN: I object to the
19 form of the question because you
20 gave -- the witness gave you a
21 complete answer and you read back a
22 phrase from his prior answer. Why
23 don't you read back the entire answer?
24 You have his explanation and opinion.
25 at his prior answer.

1 Longstreth

2 Q. If you have no further analysis?

3 A. I have nothing to add to that.

4 Q. So there is nothing supporting your
5 judgment beyond what you said in the previous
6 answer; is that correct?

7 MR. FRIEDMAN: I object to the
8 form of the question.

9 A. My expert opinion and my rebuttal
10 opinion support my judgment.

11 Q. What analysis did you perform, if
12 any, with respect to the question of whether
13 MacAndrews & Forbes had alternatives to the
14 restricted covenants in its pursuit of a
15 financing?

16 MR. FRIEDMAN: I object to the
17 form of the question.

18 A. I considered all of this. I have
19 nothing to add.

20 Q. I'm trying to understand your
21 thinking, so that we can hear about it at
22 trial and get an understanding of where
23 you're coming from.

24 So what other than you considered
25 it, can you tell me anything more?

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2 A. It's in my report.

3 Q. Can you show me where in your
4 report?

5 A. It's throughout my report.

6 Q. Can you show my any specific point
7 of your report where I can find it?

8 MR. FRIEDMAN: I want the record
9 to be clear that the witness has
10 answered your questions on this
11 subject matter as well.

12 MR. LOCKWOOD: I'm just trying to
13 avoid surprises.

14 Q. If you can show me where in your
15 report I can find this answer, I would
16 appreciate that.

17 A. It's on every page. I can't
18 pinpoint it. As I've said repeatedly, the
19 covenants were to transfer of the rights and
20 responsibilities of the board to run the
21 business at Marvel from that board to the
22 indenture trustee and the noteholders,
23 neither one of which had any fiduciary duty
24 whatsoever to the stockholders, particularly
25 the minority stockholders or Marvel itself.

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2 That's the essence of the problem
3 with these negative covenants. And that
4 analysis could not be applied to either a put
5 or a margin loan.

6 Q. Why don't you take a look at your
7 rebuttal report, again.

8 Page 2. You have a sentence that
9 provides "some specifics follow". And then
10 below that there is some numbered paragraphs.

11 A. Uh-huh.

12 Q. Are there any specifics omitted
13 from your report?

14 A. I don't know.

15 Q. Sitting here today, do you know of
16 any specifics that are missing from the
17 report?

18 A. Well, each of these points could be
19 elaborated at greater length, but there is
20 nothing, I don't think there is anything that
21 is coming out of left field, it has nothing
22 to do with the points I'm making here.

23 Q. So there is no --

24 A. I would have to reserve the right
25 to elaborate the paragraphs I have set out

1 **Longstreth**

2 **here, particularly if I'm asked questions**
3 **about it.**

4 Q. That invites me to go through all
5 the paragraphs, so why don't we do that.

6 As to the second paragraph of
7 number one, the brief two sentence paragraph,
8 it says, "As to benefits, the wealth
9 extraction from Marvel accrued solely to the
10 benefit of Ronald O. Perelman, nothing of
11 benefit accrued to Marvel or its minority
12 shareholders."

13 In your analysis, what was the
14 amount of the benefit that Mr. Perelman
15 obtained as a result of the restrictions?

16 A. **The dollar amount?**

17 Q. Yes.

18 A. **I think it was something like 535.**

19 Q. So in your view, the full amount of
20 the proceeds of the note offerings is the
21 amount of the benefit that Mr. Perelman
22 obtained as a result of having these
23 restrictions in place; is that correct?

24 A. **Yes.**

25 Q. And you are aware that Mr. Fowler's

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2 report, and I can show you where in his
3 report he does an analysis of the amount of
4 the benefit obtained by Mr. Perelman as a
5 result of the restrictions.

6 Can you look at that portion of his
7 report?

8 A. I looked at it.

9 Q. It's section 4 that begins on page
10 12, and it goes on for several pages and has
11 many subparts.

12 MR. FRIEDMAN: Is there something
13 that you want the witness to read?

14 MR. LOCKWOOD: Well, I'm going to
15 ask him a question right now.

16 Q. Do you have anything more specific
17 in response to Mr. Fowler's several page
18 analysis of the benefits to Mr. Perelman
19 beyond the two sentences that I see here on
20 page 2 of your rebuttal report?

21 MR. FRIEDMAN: When you refer to
22 Mr. Fowler's analysis, which portion
23 are you now referring to so the record
24 is clear?

25 MR. LOCKWOOD: On page 12, there

1 Longstreth
2 is a Section 4, "Benefits to the
3 Marvel Holding Companies of the
4 Restrictions".

5 MR. FRIEDMAN: And that continues
6 until page what, until page 27?

7 MR. LOCKWOOD: Yes. Pages 12 to
8 26 are the benefits of his analysis.

9 A. 12 to 26?

10 Q. Yes, 14 pages of analysis on that
11 point.

12 MR. FRIEDMAN: You want the
13 witness to tell you if he agrees or
14 disagrees with those 14, or rather 15
15 pages?

16 MR. LOCKWOOD: Yes, I have two
17 sentences in his expert report. I'm
18 looking for anything beyond those two
19 sentences that responds to those
20 pages.

21 A. I have nothing to add.

22 Q. In the next section, I mean next
23 paragraph, as to the costs, do you see that?

24 A. Yes.

25 Q. "The risk of the note issuance were

1 Longstreth

2 borne by Marvel, whose assets were in
3 practical effect the sole resource of
4 repayment."

5 A. Source.

6 Q. "Source of repayment."

7 What do you mean by that?

8 A. The -- what I mean by that is that
9 the proceeds of the notes flowed to Ronald
10 Perelman, 100 percent. The obligations on
11 the notes were incurred by holding, which had
12 no assets other than the stock of Marvel. So
13 the source of payment of both interest and
14 principal on the notes was understood by the
15 noteholders to be and expected to be solely
16 the assets and business of Marvel. And if
17 the payments were not forthcoming, or other
18 agreements by the holding companies to the
19 noteholders were violated, the sole recourse
20 of the noteholders was to foreclose on the
21 stock and take over control of Marvel, and
22 find a way either through running the
23 business successfully or liquidating it to
24 obtain payment.

25 Q. Was it your understanding that the

1 Longstreth

2 investors in the notes were looking to the
3 cash proceeds that Marvel would generate in
4 its business as a source of repaying the
5 notes?

6 A. Yes. Yes, that the profit making
7 potential of Marvel, or the value of its
8 assets, one or the other or both. They held
9 80 percent of the residual value of Marvel as
10 security for payment on the notes. That was
11 all they had. So upon a default, they could
12 take the stock only representing 80 percent,
13 but that's a controlling block, and they
14 could do what they wanted to do with it in
15 order to try to obtain repayment of their
16 notes.

17 Q. Paragraph 30 of Mr. Fowler's
18 report, can you take a look at that for a
19 moment?

20 A. 30?

21 Q. Yes.

22 It may help to look at paragraph 29
23 to put it in context.

24 A. Yeah.

25 Q. In his, in Mr. Fowler's --

1 Longstreth

2 MR. FRIEDMAN: Do you want the
3 witness to read 30 as well as 29?

4 Q. Yes, 30 as well as 29. Let me know
5 when you have read those two.

6 A. Yes, okay.

7 Q. I'll attempt to paraphrase what 29
8 and 30 say, but the essence of them is that
9 Mr. Fowler is analyzing whether the investors
10 were looking to their ability to control the
11 operations of Marvel, or that they were
12 looking to the value of the collateral,
13 meaning the stock price of the shares that
14 were pledged as their source of repayment,
15 and concludes that it was what he calls a
16 break even analysis based on stock price that
17 they were looking to make this investment.

18 Do you have a reaction to that
19 analysis?

20 A. Well, my reaction is that that's
21 a -- that's not an accurate statement.
22 Unless it's based possibly upon a very clear
23 internal memo that the noteholders wrote
24 indicating what's in their heads when they
25 negotiated the deal. I haven't seen such a

1 Longstreth

2 thing. I think it is a great over
3 simplification.

4 Q. Have you done any analysis of the
5 documents that Mr. Fowler looked at or any
6 other documents relating to the negotiation
7 or structuring of the notes?

8 A. I have done -- I have spent a whole
9 career doing secured borrowings. And I think
10 I know what's in the minds of people in
11 general when they take a pledge of stock and
12 impose covenants on a company that is the
13 issuer of the stock. And it isn't simply the
14 value, the public market value of the stock,
15 if it has a public market. It is a bundle of
16 things. There is an upside and a downside.
17 And I think it is very difficult to say that
18 these noteholders had no interest in
19 operational controls that they bargained for
20 and which we find in the agreement.

21 Q. What is your basis for that?

22 A. Common sense.

23 Q. Other than common sense, did you do
24 any analysis of the underwriter's memos or
25 similar transactions or anything like that to

1 Longstreth

2 support your view?

3 A. No, I'm basing my view on my
4 experience of doing a large number of secured
5 note agreements.

6 Q. In those secured note agreements,
7 were those situations where the issuer of the
8 notes had no expectations of obtaining any of
9 the cash flows of the underlying business?

10 A. I don't remember. I probably could
11 find some that were and some that weren't; I
12 don't know. What I'm getting at is the sole
13 source of payment in this case was from
14 Marvel's business and profits. And a secured
15 lender in that situation is looking both at
16 the prospect of selling the stock, but also
17 looking at the prospect that the stock has
18 declined in value to the point where you
19 can't recover by selling the stock. Selling
20 the stock would require registration in this
21 case. It's a controlling block of a public
22 company. It's very complicated.

23 And the decline in the stock price
24 could occur, in fact, I don't know that it
25 didn't occur in this case, with such rapidity

1 Longstreth

2 that it is too late. There is nothing that
3 you can do except foreclose on the stock and
4 then use the powers of majority stockholder
5 to try to recover.

6 And if Mr. Fowler is telling us
7 that the prospect of a decline in the value
8 of the stock such that they couldn't get
9 repayment except through ownership of the
10 company, and access to its assets, I have
11 trouble believing that.

12 Q. So the ownership of the company and
13 the access to the assets would occur upon a
14 default would take control of the stock?

15 A. Yes.

16 MR. FRIEDMAN: Are we planning to
17 go straight through to noon without a
18 break?

19 MR. LOCKWOOD: If you would like
20 to take a break now, I'm happy to take
21 a break.

22 MR. FRIEDMAN: Let's go off the
23 record for a few seconds to stretch.
24 We don't even have to leave the room..

25 THE VIDEOGRAPHER: It's 11:41 and

1 Longstreth

2 we're going off the record.

3 (Thereupon, a recess was taken,
4 and then the proceedings continued at
5 as follows:)

6 THE VIDEOGRAPHER: It's 11:44 and
7 we're back on the record.

8 BY MR. LOCKWOOD:

9 Q. Mr. Longstreth, I'd like you to
10 draw your attention to the third paragraph
11 under number 1.

12 A. Okay.

13 Q. And the second sentence you say,
14 "It is important to note that in paragraph 20
15 of the Fowler report, Mr. Fowler states with
16 implied concurrence that the rating agencies
17 treated the note issuances by the Marvel
18 holding companies as essentially debt of
19 Marvel increasing its leverage and its cost
20 of future borrowings." And you cite to
21 paragraph 20 of the Fowler report.

22 A. Yes.

23 Q. In Mr. Fowler's report, and more
24 than just paragraph 20, but several preceding
25 and subsequent paragraphs, he analyzes the

1 Longstreth

2 effect that additional debt at the parent
3 company level would have on the debt rating
4 of the operating company; is that fair?

5 **A. Yes.**

6 Q. And did you do a similar analysis,
7 yourself, an independent analysis of the
8 effect on the credit rating?

9 **A. No.**

10 Q. Did you look at anyone's analysis
11 on the effect of the credit rating other than
12 Mr. Fowler's?

13 **A. No, I relied on what he said in**
14 **that paragraph 20.**

15 Q. And --

16 **A. I think he is pointing to the**
17 **analysis that the credit rating agencies did,**
18 **and I take that to be a fact.**

19 Q. In paragraph 20 on page 10 --

20 **A. Yes.**

21 Q. -- he says, "As such, the issuance
22 of the holding company notes indirectly
23 increase the leverage of Marvel in the eyes
24 of the rating agencies which could have
25 arguably increased Marvel's cost of debt."

1 Longstreth

2 He goes on to say, "It is important
3 to note that the credit rating agencies would
4 evaluate the effect upon Marvel of any debt
5 issued by the Marvel holding companies in a
6 similar manner, whether the debt had the
7 restrictions, other structures or
8 restructured as LYONS."

9 Do you see that?

10 **A. I do.**

11 Q. Do you have an opinion as to that
12 statement in Mr. Fowler's report?

13 **A. Restate the question. Do I have an**
14 **opinion?**

15 Q. Yeah, what is your opinion, if you
16 have one, regarding Mr. Fowler's statement
17 that "It's important to note that the credit
18 rating agencies would evaluate the effect
19 upon Marvel of any debt issued by the Marvel
20 holding companies in a similar manner whether
21 the debt had the restrictions, other
22 structure or restructured as LYONS. Thus it
23 is not the restrictions that affect the
24 credit rating, but the existence of any
25 parent company debt."

1 Longstreth

2 A. I don't know whether he is right
3 about that or not.

4 Q. So you haven't done any analysis to
5 assess whether he is right about that or not;
6 is that fair?

7 A. That's right.

8 Q. Is it also true that you haven't
9 done any analysis as to whether the Marvel
10 holding companies could have issued debt
11 without the restrictions in some other form
12 or format; is that correct?

13 A. That's right. I don't know if they
14 could have issued this debt without the
15 restrictions or not. I take it that the
16 restrictions were very important, otherwise,
17 they wouldn't be there.

18 Q. And in responding to Mr. Fowler's
19 report --

20 A. Right.

21 Q. -- exchange 2?

22 A. My paragraph 2?

23 Q. His report. There is a lot of
24 reports and a lot of exhibits, so I'll try to
25 be --

1 . Longstreth

2 **A. His report?**

3 Q. His report, page 27, exchange 2.

4 **A. Okay.**

5 Q. He has, "Marvel stating to
6 MacAndrews & Forbes that the restrictions are
7 critical to marketing the holding company
8 notes." And he has, "MacAndrews & Forbes
9 having several responses to that assertion."

10 But my question to you is: Did you
11 do any analysis as to whether there were
12 alternatives, feasible alternatives from
13 MacAndrews & Forbes to having these
14 restrictions in the notes as a means of
15 raising money?

16 **A. Well, isn't that the same question**
17 **that you just asked me a minute ago?**

18 Q. It may be. The reason why I'm
19 asking it this way is so that it's tied into
20 what Mr. Fowler said. I'm just trying to get
21 a sense of whether I ask it this way, it
22 triggers any memories that you might have.

23 **A. Well, he doesn't explain what the**
24 **restrictions are doing there if they aren't**
25 **important. And he keeps saying how important**

1 Longstreth

2 the Marvel stock price is, but that's --
3 these aren't equity holders. These are
4 noteholders and they want to get repaid.
5 They have -- in my experience, noteholders
6 look on the downside as well as the upside,
7 and wonder if things don't go well, how do I
8 get repaid. And I think that's why the
9 restrictions are in there, and I think that's
10 why they were essential. And as I've said
11 before, a margin loan or put is very
12 different.

13 Q. In Mr. Fowler's report, and I'll
14 draw your attention to page 12, paragraph 26.

15 A. 26?

16 Q. Yes.

17 A. Within that paragraph, there is a
18 sentence, it's the last full sentence on the
19 page, starts "From an investor's
20 perspective."

21 Do you see that?

22 MR. FRIEDMAN: What page of
23 Fowler are you on?

24 MR. LOCKWOOD: Fowler, page 26.

25 A. The last sentence on the page,

1 **Longstreth**

2 **"From an investor's perspective?"**

3 Q. "I believe that the restrictions
4 acted as monitoring triggers that could
5 provide a method in which the noteholders
6 would receive incremental rights in the
7 financial position of Marvel, their only
8 collateral changed significantly."

9 Do you disagree with Mr. Fowler's
10 conclusion there?

11 **A. I don't understand the sentence.**

12 Q. Did you -- in drafting your report,
13 did you read this portion of his opinion and
14 formulate a rebuttal to it?

15 MR. FRIEDMAN: When you say "this
16 portion of his opinion", are you
17 referring to that one sentence?

18 MR. LOCKWOOD: That one sentence
19 or the discussion he has overall of
20 the investor's view of the purpose of
21 the restrictions.

22 MR. FRIEDMAN: Which is paragraph
23 26, all of paragraph 26?

24 MR. LOCKWOOD: Yes, and there is
25 a further discussion in paragraphs 27

1 Longstreth

2 to 32.

3 A. I never heard a -- it's a very odd
4 way of describing negative covenants, which
5 the violation of which leads to an event of
6 default. He calls them monitoring triggers
7 that would give the noteholders incremental
8 rights.

9 I mean, it's just an odd way to
10 describe what in plain English is an
11 obligation not to do certain things, an
12 obligation restricting the business of Marvel
13 in very important ways, the violation of
14 which leads to an event of default. That's
15 the plain English of it.

16 Q. And an event of default, it's not
17 an incremental right, it's a seizure of
18 control thing. Is that -- I'm trying to
19 understand your dispute.

20 A. I've never heard anyone call an
21 event of default an incremental right. It's
22 simply -- that's why I don't understand what
23 he is trying to accomplish by the sentence.
24 And I'm not even sure I know what he means.
25 I don't know what an incremental right is. I

1 Longstreth

2 do know what an event of default is and what
3 a violation of a negative covenant is. So we
4 would have to talk that over. Maybe we'll
5 get a chance to.

6 Q. In the paragraph on page 2 that
7 starts of your report -- sorry, getting back
8 to your report.

9 A. Page 2?

10 Q. Page 2.
11 You make a reference in that
12 paragraph to bad things that could happen to
13 Marvel?

14 A. Yeah.

15 Q. What are the bad things that you
16 are describing there?

17 A. Well, Marvel could become over
18 leveraged and could have its prospects
19 decline to the point where it was unable to
20 generate enough cash flow, free cash flow to
21 meet the debt service, so that it would have
22 a liquidity crisis. And that can happen to
23 any company. Of course, it wouldn't affect
24 the stock price dramatically.

25 And if that sort of thing happened,

1 Longstreth

2 the company would want to issue equity or
3 debt, subordinated debt, some combination.
4 It would want to be able to use the range of
5 possible capital raising approaches that
6 would enable it to get back on a more viable
7 road. That's the kind of bad things that
8 could happen.

9 There are other bad things, but
10 anyway that's one kind of paradigm situation.
11 And, in fact, some of those things did
12 happen. And, in fact, as I pointed out in
13 the original report, those covenants
14 restricted the freedom of action that Marvel
15 had, and, therefore, contributed to its
16 bankruptcy.

17 Q. Let's stick with that one example
18 of a bad thing, and I think we'll get to the
19 others after the lunch break. But as I
20 understood your statement, the problem that
21 you have identified as one possible outcome
22 is that Marvel would be over leveraged and,
23 therefore, would have a liquidity crisis?

24 A. It could.

25 Q. And one of the things you said was

1 Longstreth
2 that Marvel could respond to that by issuing
3 debt. I'm trying to understand how debt is a
4 good response or an appropriate response to
5 the problem of over leverage?

6 A. Well, it isn't normally a very good
7 response. I also said equity. I'm just
8 exploring a range of possibilities. Maybe it
9 is some kind of convertible debt, which is
10 used to refinance senior debt. It could be a
11 convertible subordinated debt. It could be
12 convertible debt with warrants.

13 There are a whole range of things
14 you can do to try to get yourself out of the
15 fix you're in. I do understand that fixed
16 senior debt, if you have a liquidity crisis,
17 it may not work.

18 On the other hand, the difference
19 between long-term senior notes and short-term
20 bank borrowings is most people recognize that
21 there is a difference there. And by
22 incurring long-term debt, you maybe can
23 stretch things out. Maybe you have a balloon
24 at the end. There are lots of ways, in other
25 words, that you might be able to solve a

1 Longstreth

2 liquidity crisis rather than just issuing
3 common stock, but equity helps.

4 Q. So the debt component that you're
5 talking about as a way to solve a liquidity
6 crisis arising from over leverage would be in
7 some measure a refinancing of the debt; is
8 that fair?

9 MR. FRIEDMAN: I object to the
10 form of the question.

11 A. Yes. I mean that's one way of
12 doing it. I'm not saying that -- I don't
13 know all the different ways that one might
14 have solved a hypothetical problem we're now
15 inventing, but I am saying that those
16 covenants would restrict the freedom of
17 action.

18 MR. LOCKWOOD: It's noon, so why
19 don't we take the lunch break now and
20 we'll get back together at 2:30?

21 THE VIDEOGRAPHER: The time is
22 11:59 and this ends videotape number
23 one.

24 (Thereupon, a recess was taken,
25 and then the proceedings continued as

1 Longstreth
2 follows:)

3 THE VIDEOGRAPHER: The time is
4 2:31 and this begins videotape number
5 two.

6 A F T E R N O O N S E S S I O N
7 B E V I S L O N G S T R E T H, resumed and
8 testified as follows:

9 EXAMINATION BY (Cont'd.)

10 MR. LOCKWOOD:

11 Q. Mr. Longstreth, when we ended
12 before lunch, I had asked you about the bad
13 things that you have identified in your
14 report, and one of the --

15 A. Actually that I haven't identified.

16 Q. That's what we were going to get
17 to.

18 You discussed one scenario that you
19 do identify in your report, which is that
20 Marvel as a result of these restrictions, in
21 your view, could become over leveraged.

22 So are there others, other bad
23 things that you were contemplating that the
24 directors would take into account in
25 negotiations with Mr. Perelman as to whether

1 Longstreth

2 they would accept these restrictions or not?

3 A. Well, there are a million possible
4 things that could happen to a company that
5 would cause it to suffer. That's all I was
6 referring to.

7 Look at AIG, look at Enron, any
8 kind of company that has Fannie Mae, has bad
9 things happen to it for whatever reasons, for
10 bad judgment or just the accident of business
11 developments. Anything can happen that will
12 be bad for your bottom line. And I was just
13 juxtaposing, assuming something bad happened,
14 the impact of those bad things on
15 Mr. Perelman versus Marvel. That's all.

16 Q. If any of these bad things happen,
17 I take your testimony to mean that the bad
18 things themselves are things that may affect
19 Marvel's business, cause it to do worse than
20 expected, and that as a result of the
21 restrictions, you believe that Marvel would
22 be unable to deal with those?

23 A. Well, they might be unable to deal
24 with them. The restrictions impair its
25 freedom of action. And it's freedom of

1 **Longstreth**

2 **action may prove important in remedying a bad**
3 **thing, and that's all I'm trying to say.**

4 Q. In what way do those impairments,
5 freedom of action, in your view, create any
6 reasonable or rational likelihood of
7 impairing the company's ability to respond to
8 a future crisis?

9 MR. FRIEDMAN: I want to note for
10 the record that there was -- a lot of
11 this subject was covered in the prior
12 deposition of Mr. Longstreth.

13 MR. LOCKWOOD: I'm trying to
14 understand what he is referring to in
15 this portion of the report. If he
16 wants to refer back to his old report,
17 he can refer me back to his old
18 report.

19 Q. If you want to refer back to the
20 things you said previously and say you have
21 nothing to add to that, I'll take that
22 answer.

23 A. I think I will do that because I
24 have covered the point.

25 Q. If you go to the exchange --

1 Longstreth
2 actually it's number 2 on page 2 of your
3 report. It refers to exchange 1 in
4 Mr. Fowler's report. And it says, Mr. Fowler
5 has Marvel argue that "the restrictions
6 hinder our ability to operate Marvel".

7 Do you see that?

8 **A. Yes.**

9 Q. And below that you say, "In fact,
10 the restrictions worked a transfer of
11 Marvel's corporate power from its board of
12 directors to the noteholders for so long as
13 the notes remained outstanding."

14 Do you see that?

15 **A. I do.**

16 Q. This transfer of corporate power,
17 to what extent did a transfer of corporate
18 power occur?

19 **A. Well, to the extent that the board**
20 **of directors was limited in the power it had**
21 **to borrow money or issue equity, by those**
22 **negative covenants, and in the case of the**
23 **third, what's it called Marvel III, in that**
24 **case, it was further limited by the need to**
25 **maintain the 80 percent ownership. That made**

1 Longstreth

2 consolidation possible, and, therefore, made
3 the tax payments possible, upstream payments
4 that would be used for meeting the debt
5 service on the third traunch of notes, which
6 I believe were the only traunch that called
7 for current payments of interest.

8 That's the transfer of power that
9 I'm talking about. It was -- it wasn't a
10 complete transfer of power. It was a
11 transfer of power to the extent that those
12 restrictions interfered with something the
13 board of directors otherwise would have done
14 or wanted to do or even wanted to explore
15 doing.

16 Q. Well, any contract that a company
17 enters into in some way limits the board's
18 future discretion as to that particular
19 subject matter; is that fair?

20 A. That's fair.

21 Q. So the concept of entering into
22 agreement, because this is a hypothetical
23 bargaining situation that results in
24 agreement where Marvel is going to be paid
25 something for agreeing to these restrictions,

1 Longstreth

2 the concept in general of accepting some
3 limitations on future discretion is not
4 something that you think is out of bounds; is
5 that fair?

6 A. Well, it's the asymmetrical aspect
7 of this particular set of negative covenants
8 that I have a problem with. Because it --
9 the restrictions are on Marvel, yet the
10 purpose of the restrictions benefitted solely
11 the holding companies and Perelman. So the
12 benefit burden is asymmetrical, which is not
13 the normal situation when a board decides to
14 restrict its freedom of action by entering
15 into a contract for its own benefit.

16 Q. Well, you understood that
17 Mr. Fowler's report is analyzing a
18 circumstance where Marvel is approached and
19 asked how much would it require in terms of
20 payment to accept those restrictions; is that
21 right? Is that your understanding of his
22 report?

23 A. That's what he was asked to
24 consider?

25 Q. Yes.